Filed 3/18/19 In re J.S. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.S., et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.J., Defendant and Appellant.	E071031 (Super.Ct.Nos. J271958, J271959 & J271960) OPINION

APPEAL from the Superior Court of San Bernardino County. Annmarie G. Pace, Judge. Affirmed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, Dawn M. Martin, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant R.J. (father) appeals from an order summarily denying his Welfare and Institutions Code[1] section 388 petition for modification filed in juvenile dependency proceedings while the permanent plan selection hearing was pending as to his three children (the children). He argues that the juvenile court abused its discretion when it failed to order a hearing to determine whether family reunification services should be reinstated and whether his visits with the children should be increased and unsupervised. We will affirm.

BACKGROUND

Father is the presumed father and S.R. is the mother of the children. In June 2017, when the children were ages six, three, and almost two, they were living with their mother in the home of their maternal grandparents. At the time, father, who had a history of substance abuse and criminal lifestyle, was incarcerated following conviction on a first degree burglary charge. On June 8, 2017, San Bernardino County Children and Family Services (CFS) received a report that the mother had left the home without the children and was expected to return in a couple of hours but did not return for three days. A social worker visit resulted in a voluntary safety plan, which included a provision that the mother enter a substance abuse program.

The mother did not comply with the plan, choosing instead to disappear and leave the children with their grandparents. In July, the social worker took the children into

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

protective custody and filed a section 300 juvenile dependency petition as to each of them.

In September 2017, following mediation that father but not the mother participated in, the juvenile court sustained amended petitions, which alleged the parents had failed to protect their children (§ 300, subd. (b)) and left them without provisions for support (§ 300, subd. (g)). The sustained allegations under section 300, subdivision (b), included the parents' inability to protect and provide for the children due to their history of substance abuse, father's criminal lifestyle and consequent incarcerations, and the mother's failure to provide them with food, clothing, and shelter. The sustained section 300, subdivision (g) allegation as to father concerned his unavailability to care for the children because he was in prison with an anticipated release in October 2017. The mother's whereabouts were unknown.

Immediately following the jurisdictional hearing, the court adjudged the children dependents of the court, removed them from their parents, and ordered family reunification services. Father's plan requirements included maintaining his relationships with the children by participating in scheduled visits, as well as participating in individual therapy, parenting classes, substance abuse treatment, and substance abuse testing.

Father was released from prison in October 2017, a month after the hearings on jurisdiction and disposition. He contacted CFS right away and appeared to be very motivated to reunify with his children. The social worker provided him with information about services and arranged weekly visits with the children. He failed to follow through

with services but did attend three supervised visits in October. During the visits, he was appropriate and engaged with the children, who seemed to enjoy seeing him.

By November 2017, he was back to using drugs. For the next three months, he did not visit the children or make an effort to begin services. In mid-February 2018, he contacted the social worker to advise her of the relapse and to express his desire to get on track with services and to resume visits.

By the time of the March 2018 contested status review hearing, the children had been placed with their maternal grandparents for four months and were doing well there. Father had been enrolled in a live-in, 90-day drug rehabilitation program for over three weeks, he had a sponsor, and was fully participating in the full-time program. He had attended a three-hour visit in February and another was scheduled for the Sunday following the hearing. The juvenile court noted that father was showing dedication but that he had not made sufficient progress with visits or the other requirements of his case plan to warrant granting his request to extend services for an additional six months. Over father's objection, it terminated family reunification services and set the cases for a permanent plan selection hearing pursuant to section 366.26. The court also ordered supervised two-hour visits twice a month for father and the children, with the potential for increasing the frequency and duration if they took place consistently and were going well.

In its report prepared in anticipation of the July 20, 2018 permanent plan selection hearing, CFS recommended termination of parental rights and a permanent plan of

adoption by the maternal grandparents. The children had known the grandparents their entire lives and enjoyed a close relationship with them. They had lived with the grandparents for a significant period of time before and during the dependency proceedings and referred to them at times as "mom" and "dad."

At the hearing, the juvenile court granted CFS's request for a continuance because it had not yet obtained the resource family approval of the grandparents' home. It set a new date of November 19, 2018. Father's request for an increase in visits pending the hearing was denied.

On July 23, 2018, father filed a section 388 petition to change the juvenile court's orders terminating family reunification services and setting the permanent plan selection hearing. He alleged that, in the four months or so elapsing since family reunification services were terminated in March 2018, he was actively engaged in services. He had completed a 12-session parenting class, obtained a better paying job, and moved into stable housing. He had attended over 49 Alcoholics Anonymous/Narcotics Anonymous meetings and graduated from the 90-day residential treatment program in late May where he completed a minimum of 50 hours a week of services and engaged in weekly individual counseling. The program subjected him to random drug and alcohol testing two or three times a week with no adverse results. Upon successful completion of residential treatment, he transitioned into a sober living environment and intensive outpatient program services, which required him to continue with the substance abuse testing schedule and to attend weekly meetings.

The petition stated that the children's interest would be best served by reinstating reunification services because he continued to visit them, they were bonded with him, he had done what he needed to do to provide for the children and to be a better parent, and they deserved to be raised by him.

The juvenile court summarily denied the petition for modification. Father appealed.

DISCUSSION

Father argues that the juvenile court abused its discretion when it failed to grant a hearing on the modification petition because he had made prima facie showings of a change of circumstances and of how it would be in the children's best interests to resume reunification services and liberalize visits. We disagree.

Subdivision (a)(1) of section 388 provides in relevant part that a parent of a child who is a dependent of the juvenile court may, upon grounds of a change of circumstance, petition the court to modify or set aside a previous order made by that court. The statute plays a critical role in the dependency arena. It provides a means for the juvenile court to consider a legitimate change of circumstances even after termination of family reunification services, and it provides an opportunity to reinstate services in appropriate cases where so doing would be in the minor's best interest. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*); *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506.)

In order to be entitled to a hearing on a section 388 petition, the parent must make a prima facie showing not only of a change of circumstance but also how the proposed

modification of the prior order might advance the child's best interest. (§ 388, subds. (a)(1), (d); Cal. Rules Court, rule 5.570(d); *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157 (*G.B.*).) If, as here, family reunification services have been terminated, a parent's petition seeking further reunification efforts must also make a prima facie showing that resumption of services might advance the child's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re J.C.* (2014) 226 Cal.App.4th 503, 527.) If the parent's circumstances are changing but have not yet changed, the juvenile court is entitled to conclude that provision of further services is contrary to the minor's interest in having a permanent and stable home. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47-48.)

The petition is to be liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The juvenile court may consider the entire procedural and factual history of the case when deciding whether the petition makes the necessary showing. (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.) The prima facie requirement is not met unless the petition contains facts that, if established at a hearing, would provide sufficient support for granting the petition. (*Ibid.*)

We review a juvenile court's summary denial of the petition for abuse of discretion. (*G.B.*, *supra*, 227 Cal.App.4th at p. 1158.) We will not disturb that court's decision unless we find that it exceeded the limits of discretion by making an arbitrary, capricious, or patently absurd determination. (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 705-706.)

In this case, the juvenile court did not abuse its discretion when it denied father's petition without a hearing. Even if a hearing established father's progress in services as recited in the attachments to his petition, those efforts would not sustain an order to provide additional reunification efforts. They reflected that his circumstances were changing but had not yet changed. Moreover, his petition failed to make a prima facie showing that the proposed change of order would advance the children's best interest, including their need for a stable and permanent living situation.

It is difficult to make a showing of changed circumstances for the purposes of a section 388 petition when one of the conditions leading to dependency is the parent's substance abuse—a problem that is not easily resolved or ameliorated. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 225.) It is well-settled that a parent with a long-standing substance abuse problem severe enough to cause the parent to be unable to provide adequate care for a child cannot show changed circumstances within the meaning of section 388 by showing recent sobriety and participation in a treatment program. (*Id.* at p. 223.)

Here, the sustained dependency petitions included an allegation that father was unable to provide regular care for the children due to his substance abuse, which included use of methamphetamine, heroin, alcohol, and marijuana. The record does not specify how many years father had been using those substances, but his criminal history reflects that he possessed a hypodermic needle in October 2011, he brought narcotics into a jail

facility in December 2016, and drove under the influence of a drug in March 2017. The children's mother reported he was using drugs and alcohol in 2016.

And, it is clear that father had issues with relapsing even when faced with the prospect of losing his children. When he was released in October 2017 after eight months in prison, he immediately contacted CFS and expressed his desire to do whatever was necessary to gain custody of the children because he believed their mother was not going to reunify with them. Although he recognized the high stakes involved and appeared motivated to participate in reunification services, he nevertheless relapsed and did not enter a treatment program until late February 2018. Taken together, the facts of his polysubstance abuse, the criminal history set forth in the social worker's report, and the postprison relapse readily give rise to a reasonable inference that father's substance abuse issues were long-standing and entrenched.

The section 388 petition reflects that father made commendable progress in the five months elapsing since he began rehabilitation efforts to treat his substance abuse issues. That progress, however, signals only that his circumstances were changing. The juvenile court did not abuse its discretion when it summarily denied the petition on the ground that it did not make a prima facie showing of changed circumstances.

On appeal, father argues in essence that resumption of drug use after his release in October 2017 should not count against a finding of changed circumstances because relapse is part of recovery, and he thereafter entered and completed a residential treatment program. But, it is precisely because relapses are all too common for a

recovering addict that it was reasonable for the juvenile court to find that his five or so months of "clean time" did not establish a prima facie case of changed circumstances. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423-424.) "It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9.)

And, even if the petition had made a prima facie case of changed circumstances, it did not make a sufficient showing that further reunification services would advance the children's best interest generally, and it made no reference to how the proposed order would advance in particular their interest in permanency and stability. The petition simply stated that he was visiting the children, that they are bonded with him, and that they deserved to be raised by father who was ready to be a better parent.

The notion that the children "deserve" to be raised by father fails to take into account that, after family reunification services are terminated, the focus is no longer having a parent act in the role as caretaker. (*Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) Rather, the presumption at that juncture is that continued care in the maternal grandparents' home is in their best interest. (*Id.* at p. 302.) That presumption was not rebutted here by father's declaration in the petition that the children are bonded to him.

Father also contends that the juvenile court abused its discretion when it found his petition did not make a prima facie showing that the children's best interest would be served by the proposed change of order. He claims that his oldest daughter has a bond with him because she was six years old when he was arrested in March 2017 and, when

interviewed by the social worker in August 2017, she said father treated her well, there was no domestic violence in the home, her needs had been met, and she loved her family. Father also posits that, other than the period of incarceration in 2017, there is nothing in the record to suggest that he was away from any of the children for any significant period of time. His claims are unavailing.

Although father is correct that the record does not specify the number of months or years that he was absent from the family prior to his arrest in March 2017 and subsequent incarceration, it does reflect that he had a history of being in and out of custody. Moreover, there is no indication in the record that he had a single visit with the children during the eight months he was incarcerated in 2017. Upon his release, he visited the children three times in October 2017, and then did not see them again until February 25, 2018. All in all, by the time reunification efforts were terminated in March 2018, he had seen them only four times in the preceding 12 months. That represents a significant period of separation for any child, but especially for the very young children involved here, who were ages two, three, and six at the time.

Father, who was found by the juvenile court to be the eldest child's presumed father, did occupy a parental role in that child's life for a least some of her six years. He began providing care and support for her when she was 16 months old even though he did not begin living with the family until sometime after the conception of his son, who was born in April 2014. The eldest child expressed her love for her family in her August 2017 social worker interview, but it appears the statement was made while speaking of

having her needs met and feeling safe with her "parents and grandparents." The record simply does not reveal facts that reasonably lead to the conclusion that the children's relationship with father trumps their interest in having a permanent and stable home, particularly when considered together with father's aforementioned dismal visit history.

Father also posits that there is no reason to think that the children's stable placement would be jeopardized by resuming reunification efforts. Even if one assumes that renewed provision of services would not be disruptive for the children, it would certainly delay *permanency* for them. (*Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

The juvenile court's summary denial of the section 388 petition was not an abuse of its discretion.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

FIELDS
J.

MENETREZ
J.